

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

IN RE: PETITION OF MCI WORLDCOM,  
INC, TO ENFORCE INTERCONNECTION  
AGREEMENT WITH BELL SOUTH  
TELECOMMUNICATIONS, INC

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DOCKET NO. 99-00662

EXECUTIVE ORDER

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**POST-HEARING BRIEF AND PROPOSED FINDINGS OF MCI WORLDCOM, INC.**

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**STATEMENT OF FACTS**

On June 15, 2001, the Hearing Officer issued the Initial Order ("Initial Order") in this case in which the Hearing Officer found that (1) ISP-bound traffic was subject to the reciprocal compensation provisions of the MCI-BellSouth Interconnection Agreement (hereinafter "MCI Agreement") and (2) in the absence of evidence that the MCI switch performed the tandem functionality of the BellSouth network, the appropriate reciprocal compensation rate to be paid was the direct end office termination rate of \$.004 contained in the MCI Agreement. The Initial Order directed BellSouth to (1) immediately pay MCI any reciprocal compensation payments due for ISP-bound traffic that it had withheld and (2) to pay MCI reciprocal compensation for all ISP-bound and other local traffic at the switching rate applicable to the switching actually performed. The Initial Order was to become the Final Order of the TRA on June 30, 2001, if not appealed by either party.

On July 2, 2001, MCI filed a Petition for Review of the Hearing Officer's finding that the appropriate reciprocal compensation rate to be paid was the direct end office termination rate of \$.004. On July 6, 2001, MCI withdrew that appeal and requested that the TRA establish a "date certain" on which BellSouth was to make payments of past reciprocal compensation amounts due to MCI from BellSouth. On July 10, 2001, the TRA made its decision on MCI's request and

found that, with the withdrawal of the MCI Petition for Review, the Initial Order became effective on June 15, 2001 and directed that on or before July 13, 2001, BellSouth shall make all payments due to MCI as ordered in the Initial Order.

On the date of the TRA's decision, MCI provided to BellSouth a pro forma schedule from MCI's records, which showed a total amount due of \$10.2 million based on the re-rating of the local minutes of use throughout the history of the account at the \$.004 per minute of use end office reciprocal compensation rate,. (Aronson Direct testimony, 8/17/01 Affidavit, paragraphs 4, 5 and Exhibit 1). By letter dated July 16, 2001, BellSouth advised MCI that it had made wired an initial payment of \$2,223,231 on July 15, 2001 and had made a subsequent payment \$700,000 on July 16, 2001. (Aronson Direct Testimony, 8/17/01 Affidavit, paragraph 5, and Exhibit 2, July 16, 2001 letter from Jerry Hendrix of BellSouth to Marcel Henry of WorldCom).

The July 16, 2001 letter from BellSouth stated that basis for the discrepancy between the amount BellSouth paid and the \$10.2 million presented by the MCI pro forma schedule as due was (1) MCI used the incorrect Percentage Local Use (PLU) factor in calculating the amounts that BellSouth owes; (2) BellSouth applied the end office switching rate of \$.0008041 contained in its compliance filing of the TRA's June 15, 2001 Order in Docket 97-01262 for the period from April 4, 2000 to July 16, 2001 and (3) MCI is reporting more terminating minutes than BellSouth's switches show were originated. (Aronson Direct Testimony, 8/17/01 Affidavit, Exhibit 2, July 16, 2001 letter from Jerry Hendrix of BellSouth to Marcel Henry of WorldCom).

On August 17, 2001, MCI filed its Motion for Sanctions against BellSouth. In its Motion for Sanctions, MCI alleged that BellSouth was in knowing and intentional violation of the TRA's July 12, 2001 Order that required BellSouth to make all payments due to MCI by July 13, 2001 and that BellSouth had engaged in *"a series of acts, including the unilateral changing of bills, withholding information and refusing to follow contract procedures for resolving disputes which*

*appear to reflect a pattern of anti-competitive conduct".* As a result, MCI requested that the TRA (1) order BellSouth to pay immediately the full \$10.2 million owed to MCI; (2) impose a fine on BellSouth of \$1,000 for each day that BellSouth fails to comply with the July 12, 2001 Order; (3) take such other actions as may be necessary to enforce the July 12, 2001 Order and (4) order BellSouth to reimburse MCI for the costs, including legal fees, of bringing this motion.

### **ARGUMENT**

To resolve this dispute concerning the amount of reciprocal compensation owed by BellSouth to MCI WorldCom, Inc. ("MCI" or "MCImetro") the Hearing Officer must address the following three issues:

1. **Number of Minutes** MCI measures its terminating minutes of use "based on standard Automatic Message Accounting ("AMA") recordings made within each party's network" as required by Section 7.1 of Attachment IV of the parties interconnection agreement. (The Section is called "Usage Measurement.") Tr. 84. Beginning in January, 2000, BellSouth began disputing MCI's recorded usage and began paying only on BellSouth's recorded usage. Tr. 151-156.

There is no provision in the agreement which allows BellSouth to substitute its usage for that of the billing party. Neither BellSouth's attorneys nor its witnesses have identified any such provision or provided any legal basis to support BellSouth's unilateral decision to disregard the explicit provision of the agreement and to pay reciprocal compensation based on BellSouth's measurement of minutes terminating at MCI's switch.

Furthermore, as reflected in the Dispute Letters from BellSouth (Exhibit 4), BellSouth itself did not dispute MCI's usage prior to January, 2000, but paid reciprocal compensation based on the usage recorded and billed by MCI. Tr. 155-156. However, when the TRA ordered BellSouth to pay MCI reciprocal compensation for ISP-bound traffic, BellSouth – for the first

time – recalculated the number of minutes based on BellSouth's measurements all the way back to April, 1997. Tr. 158. This was done apparently on instructions from Mr. Jerry Hendrix. Tr. 149-150.<sup>1</sup>

2. **Percentage Local Usage.** Once the total number of minutes is determined, the Hearing Officer must decide if MCI has properly separated "local" minutes from "intraLATA" minutes. MCI is entitled to reciprocal compensation for terminating local traffic and receives access charges for terminating intraLATA traffic.

Based on Section 7 of Attachment IV of the interconnection agreement, MCI records all terminating minutes of use, "these recordings being necessary for each party to generate bills to the other party." As provided in Section 2.2.1 of Attachment IV ("Compensation for Call Traffic Transport and Termination"), MCI then compares the originating and terminating telephone numbers (NXX's) with the local calling areas in Section A3 of BellSouth's tariffs. (For that purpose, Section 2.2.1.1 of the agreement requires BellSouth to provide "an all-inclusive list . . . of NXX's pertaining to section 2.2.1 above" so that MCI can correctly identify local calls.)

BellSouth, however, has claimed a unilateral right to make its own determination of which calls are local and which calls are intraLATA based, not on the local calling zones set forth in BellSouth's tariffs but on how a call is perceived by the subscriber. Tr. 122-123. If, for example, the subscriber has an optional calling plan that allows him to make flat-rated, unlimited calls between Jackson, Tennessee and Memphis, Tennessee, BellSouth argues that all such calls

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<sup>1</sup> Mr. Hendrix also instructed his staff to pay MCI reciprocal compensation at the rate of \$0.0019 per minute even though the agreement provides for an end office rate of \$0.004. r. 148-149. BellSouth has not even tried to defend or justify the use of the incorrect, lower rate. Mr. Hendrix's actions, however, reflect a pattern of illegal conduct designed to avoid paying BellSouth's contractual obligations.

should be treated as "Local Traffic" under the agreement (tr. 129) even though Jackson and Memphis are not in the same local calling area.

The agreement states that terminating minutes are measured and billed by the terminating carriers. Section 7.1. Nothing in the agreement allows the originating carrier to dictate to the terminating carrier how to separate terminating local traffic from terminating access traffic. Nor is there any language in the agreement to support BellSouth's theory that the definition of "local traffic" depends upon the perception of the customer rather than where the call originates and terminates. To the contrary, the agreement requires BellSouth to provide MCI BellSouth's "NXX" data so that MCI can accurately separate local from intraLATA traffic for billing purposes.

Furthermore, BellSouth's definition of "Local Traffic" for reciprocal compensation purposes is directly contrary to federal law and the rulings of the TRA. As the TRA noted in the Intermedia arbitration decision (docket 99-00948, Order issued June 25, 2001), the FCC has ruled that "traffic originating and terminating outside of the applicable local calling area would be subject to interstate and intrastate access charges." Intermedia Order, at 43, quoting paragraph 1035 of the FCC's *First Report and Order*, CC Docket 95-185, FCC 96-325. Based on the FCC's rulings, the TRA declared in the Intermedia Order (at 42-43) that "calls to a NPA/NXX in a local calling area outside the local calling area where the NPA/NXX is homed should be treated as intrastate, inter-exchange traffic and, therefore, agree[d] with BellSouth that calls to and from such calling areas are non-local" for reciprocal compensation purposes. In that decision, the TRA specifically held that calls made via BellSouth's Foreign Exchange ("FX") service should be treated as intraLATA toll calls even though such calls are perceived by the caller as local calls. Order, at 43.

Finally, the Hearing Officer should note that BellSouth's argument on this issue is exactly the opposite from the company's position in the Intermedia arbitration that traffic jurisdiction "is determined by the originating and terminating points of a call." Intermedia order, at 40. To counsel's knowledge, BellSouth has always maintained, in every TRA proceeding where the issue has arisen, that "local traffic" is measured by the originating and terminating points of a call and not whether the call is perceived as "local" by the subscriber. Asked about his contradiction, Mr. Finlen simply dodged the question and then retreated to his understanding of the agreement. Tr. 130-131.

In sum, the term "Local Traffic" is defined in the agreement based on local calling areas as set forth in BellSouth's tariffs. For that reason, the agreement requires BellSouth to provide MCI with all applicable NXX codes. "Local Traffic" has nothing to do with a customer's optional local calling plans, such as FX service, which, in reality, "is no different than an intrastate interexchange service." *Intermedia Order*, at 42. Any interpretation to the contrary would be inconsistent with the FCC's orders, the rulings of the TRA, and the long-standing position of BellSouth itself. BellSouth's 180 degree change of heart on this issue is simply another indication that BellSouth's refusal to pay is motivated, not by an honest difference over the terms of the agreement, but by the arbitrary instructions of Mr. Hendrix.

3. **End Office Rate.** The final issue is what rate to apply to local calls terminated by MCI.<sup>2</sup> Although BellSouth initially claimed that the applicable rate was \$0.0019 and paid MCI based on that figure (tr. 148-150), BellSouth apparently dropped that argument when ordered to

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<sup>2</sup> As shown in the Dispute Letters, BellSouth initially contested MCI's terminating access rate for intraLATA toll calls. Although the correct rate is set forth in MCI's tariffs, BellSouth simply recalculated the bills using BellSouth's terminating access rate. See, for example, the Dispute Letter dated March 1, 2000. Here again, BellSouth has not even attempted to defend or justify the company's actions. See. Tr. At 17.

pay by the TRA in this docket. As reflected in the July 15, 2001 letter from Jerry Hendrix to Marcel Henry (attached to the direct testimony of Dan Aronson), BellSouth paid reciprocal compensation to MCI at a rate of \$0.004 per minute for usage from April 4, 1997 through April 13, 2000, and at a rate of \$0.0008041 per minute for usage after that date. As explained by Mr. Hendrix in his letter, the parties' current agreement provides that the "rates, terms, and conditions agreed to in a subsequent agreement (*i.e.*, the pending arbitration) will be retroactive back to the expiration date" of the current agreement. Therefore, since the parties new agreement will presumably incorporate the "permanent" UNE rates established by the TRA in docket 97-01262, BellSouth decided to go ahead and implement the "true-up" provision now – as it applies to reciprocal compensation – rather than wait for the new agreement to become effective. Mr. Hendrix then instructed Mr. McIntire to prepare the exhibit attached to his testimony in accordance with Mr. Hendrix's "anticipated true-up" theory. Tr. 148.

There is no basis whatsoever in the agreement for BellSouth's unilateral decision to implement the new, end-office rate, effective April 4, 2000, prior to the signing of a new agreement. To the contrary, Section 3 of Part A of the current agreement expressly states that the rates contained in the agreement will remain in effect until a new agreement becomes effective and, at that time, there will be a retroactive adjustment of all rates back to April 4, 2000. At this time, the parties' arbitration is still pending before the agency and no new agreement exists.

At the hearing, BellSouth witness Richard McIntire stated that the argument made by Mr. Hendrix in the July 16 letter remains BellSouth's position concerning the proper amount owed to MCI. Tr. 161-162. BellSouth witness Mr. Finlen testified, however, that the rate of \$0.0008041 should be applied to all usage since April, 1997 and that BellSouth's payment of \$2.9 million on July 16, 2001, was, in fact, an overpayment. Tr. 109. Mr. Finlen based his argument on another

provision in the agreement which refers to “a true-up of all the rates contained in the agreement” back to the effective date of the agreement. Tr. 113. But Mr. Finlen also acknowledged that, at this time, no such true-up has occurred (tr. 114) and that BellSouth is continuing to charge MCI the UNE rates contained in the current agreement. Tr. 117. Asked why the reciprocal compensation rate should be handled differently than any other rate in the current agreement, Mr. Finlen again dodged the question. Tr. 117-118.

Unless and until these “true-ups” occur, BellSouth has no basis for its unilateral decision to implement the new end-office switching rate at this time. Furthermore, BellSouth’s changing arguments indicate, once again, that the company is literally making up reasons after the fact to try to justify Mr. Hendrix’s refusal to pay MCI the amounts owed under the contract.

In each of these three areas of dispute, BellSouth has demonstrated an arrogant disregard for the language of the contract and the orders of the TRA to pay MCI for terminating local calls. When MCI first filed testimony on May 11, 1999, in this docket, Mr. Aronson set forth the exact amount BellSouth owed MCI at that time for reciprocal compensation, \$3,575,462, and showed how he arrived at that total.

In response, BellSouth raised the end-office tandem issue and questioned the jurisdictional nature of ISP-bound traffic. BellSouth never challenged MCI’s method of separating local from intraLATA traffic.<sup>3</sup>

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<sup>3</sup> Although BellSouth had raised these and other issues in Dispute Letters, MCI had no way of knowing until BellSouth filed its rebuttal testimony whether BellSouth would make those same arguments to the TRA. As previously noted, BellSouth took various untenable positions in its Dispute Letters which the company later changed, or dropped, once the matter came before the Authority. Since BellSouth raised only two issues in response to Mr. Aronson’s calculation of the amount owed, MCI presumed those were the only two matters that needed to be resolved in this docket.



If BellSouth disagreed with Mr. Aronson's testimony concerning MCI's usage and separation of local traffic, BellSouth should have raised those issues at the time. They did not, MCI submits, because BellSouth's position on those issues is plainly inconsistent with the language of the agreement.<sup>4</sup> BellSouth raises those issues now in order to prolong this litigation and to continue withholding payment from MCI as ordered by the Authority.

Finally, BellSouth has admitted that, even though Mr. McIntire learned of the TRA's decision by July 5, 2001, Mr. McIntire sent a Dispute Letter to MCI dated August 15, 2001, withholding reciprocal compensation for ISP-bound traffic. Tr. 145-147. This "mistake" on BellSouth's part (tr. 145) constitutes an admitted violation of a TRA order and provides grounds for sanctions pursuant to T.C.A. §§ 65-3-119 and 65-4-120, and such other relief as the TRA finds appropriate.

### **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. MCI's Request that BellSouth be Directed to Pay Immediately the \$10.2 million.

Issue: Whether MCImetro is required to apply the BellSouth Percentage Local Use ( PLU) factor in determining the amounts that is due MCImetro under the TRA's July 12, 2001 Order.

1. Attachment IV, Section 7.1 of the MCImetro Agreement provides that,

*Each party shall calculate terminating interconnection minutes based on standard Automatic Message Accounting (AMA) recordings made within each party's network. These recordings being necessary for each party to generate bills to the other party.*

(Direct Testimony of Dan Aronson, 8/17/01 Affidavit, paragraph 10).

2. AMA data provides the NPA-NXXs of the origination point and termination point of the call. (Direct Testimony of Richard McIntire, pg. 3, lines 5-6). MCImetro's billing

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<sup>4</sup> Apparently for the same reason, BellSouth elected not to argue that the end-office switching rate was \$0.0019 even though BellSouth had taken that position in the Dispute Letters. Tr. 149-150.

system is able to capture from the terminating call detail the originating and terminating telephone number information embedded in the AMA records on an individual call basis and perform a direct jurisdictionalization of the traffic as local or toll traffic. This is done by comparing the originating and terminating NPA-NXX to a reference table constructed from the BellSouth General Subscriber Services tariff for the Memphis market. This table defines calls as local or toll based on the to/from rate centers and the NPA-NXXs associated with those rate centers. (Direct Testimony of Dan Aronson, 8/17/01 Affidavit, paragraph 19.)

3. Attachment IV, Paragraph 2.2.1 of the MCImetro Agreement defines "*Local Traffic*" as "*any telephone call that originates and terminates in the same exchange, or in a corresponding Extended Area Service (EAS) exchange*" as defined and specified in the Section A3 of BellSouth's General Subscriber Services Tariff. MCImetro's switch is located in the Memphis Metropolitan local calling area. Section A3.6.1 of the BellSouth General Subscriber Services Tariff specifies the Memphis Metropolitan local exchange and the additional exchanges (or corresponding EAS exchanges) for the Memphis Metropolitan local calling zone. The exchanges and additional exchanges listed for the Memphis Metropolitan local calling area are consistent with the MCImetro local calling area as listed in the MCImetro tariff. (Rebuttal Testimony of Dan Aronson, pg. 12, lines 12-34).
4. If the origination and termination points of a call are within the exchanges listed in Section A3.6.1 of the BellSouth General Subscriber Services Tariff for the Memphis Metropolitan local calling area, MCImetro rates the call as local and the reciprocal compensation rate in the MCImetro Agreement is applied. If the origination point of the call is from an exchange not listed in Section A3.6.1 of the BellSouth General Subscriber Services Tariff for the Memphis Metropolitan local calling area, then the call is jurisdictionalized as toll and MCImetro's intrastate switched access rates are applied. (Rebuttal Testimony of Dan Aronson, pg. 12, lines 39-41 and pg. 13, lines 1-5).
5. The determination of whether a call is to be rated as local call, for connectivity billing purposes, is governed by the language in the MCImetro Agreement. The

determination of whether a call is to be rated as a local call, for connectivity billing purposes, is based on whether the call "*originates and terminates in same exchange, or in a corresponding Extended Area Service (EAS) exchange*" as defined and specified in the Section A3 of BellSouth's General Subscriber Services Tariff. The determination of whether a call is rated as a local call, for connectivity billing purposes, is not dependent upon whether a BellSouth end user perceives that he or she is making a "local call" under a BellSouth optional calling plan or how BellSouth bills the end user for that call. (Rebuttal Testimony of Dan Aronson, pg. 13, lines 20-22.)

6. The MCImetro billing system, which utilizes AMA recordings as directed in Attachment IV, Section 7.1 to generate connectivity bills, contains "*actual charge*" information. MCImetro's billing system is accurately rates calls and applies reciprocal compensation rates to local calls and access rates to toll calls based on the definition in the MCImetro Agreement. (Direct Testimony of Dan Aronson, 8/17/01 Affidavit, paragraph 19). MCImetro is not required to utilize the PLU developed by BellSouth based on proprietary CSR records, which reveal whether the customer has subscribed to a BellSouth optional calling plan or not.
7. MCImetro accurately rates county-wide calls in Shelby County, Tennessee, where the MCI switch is located, as local calls. (Rebuttal Testimony of Dan Aronson, pg. 13, lines 24-30).

Issue: What is the appropriate rate to be paid to MCImetro to determine the amounts that are due to MCImetro under the TRA's July 12, 2001 Order.

8. The Initial Order of the Hearing Officer found that the appropriate reciprocal compensation rate to be billed by MCImetro to BellSouth is the direct end office termination rate of \$.004 per minute of use. With the withdrawal of the MCImetro Petition for Review on July 6, 2001, the Initial Order of the Hearing Officer became the final Order of the TRA, effective June 15, 2001.
9. The MCImetro Agreement is a currently effective interconnection agreement between MCImetro and BellSouth. Part A, Section 3 of that agreement provides that the term

of the agreement is three years from the date of its execution (April 4, 1997). The section further recognizes that the parties may not be able to reach an agreement before the expiration of the three years and that the parties will continue to perform under the existing agreement until a new agreement is executed. In that event, Section 3 states that the rates, terms and conditions will be retroactive to the date of the expiration of the existing agreement (or April 4, 2000). At the time the next MCImetro-BellSouth interconnection Agreement is executed, the results of the TRA-ordered UNE rates in Docket No. 97-01262 will be incorporated into the pricing schedule of the new interconnection agreement and both BellSouth and MCImetro will be required to issue retroactive credits on accounts to reflect the lower UNE and reciprocal compensation rates. (Direct Testimony of Dan Aronson, 8/17/01 Affidavit, paragraph 7).

10. The existing MCImetro Agreement has not been amended and a new interconnection agreement has not been executed between the parties. The new interconnection agreement is presently the subject of an arbitration proceeding before the TRA. (Direct Testimony of Dan Aronson, 8/17/01 Affidavit, paragraph 8). Unless and until a new interconnection agreement or an amendment to the existing interconnection agreement is executed to reflect the UNE and reciprocal compensation rates in the BellSouth Tariff filed pursuant to the TRA's February 23, 2001 Order in Docket No. 97-01262, the appropriate reciprocal compensation rate to be paid by BellSouth to MCImetro is the direct end office termination rate of \$.004 per minute of use.

11. BellSouth cites Attachment I, Section 1.1 and Attachment IV, Section 2.2.1 for the proposition that the direct end office termination rate contained in the MCImetro Agreement changed automatically when the TRA issued its February 23, 2001 Order. (Direct Testimony of Patrick Finlen, pg. 8, lines 1-3) This argument is unavailing. As an initial matter, the TRA Order, by its terms, directed BellSouth to file a tariff to *"provide the parties the opportunity to adopt UNE rates established in a contested case proceedings that are consistent with the Act."* Furthermore, the BellSouth Tariff, by its terms, provides that the *"provisions of this Tariff do not supercede or in*

*any way modify the provisions, including rates, terms and conditions, of any currently effective agreement between any CLEC and the Company.”*

Issue: What is the appropriate usage measurement to use in calculating the amount due to MCImetro under the TRA’s July 12, 2001 Order.

12. Attachment IV, Section 7.1 of the MCImetro Agreement provides that,

*“Each party shall calculate terminating interconnection minutes of use based on standard Automatic Message Accounting (AMA) recordings made within each party’s network. These recordings being necessary for each party to generate bills to the other party.”*

(Aronson Direct Testimony, 8/17/01 Affidavit , paragraph 10.)

13. MCImetro’s billing system utilizes AMA recordings for purposes of calculating terminating interconnection minutes of use in order to generate connectivity bills to BellSouth. (Aronson Direct Testimony, 8/17/01 Affidavit, paragraph 19.)

14. Except with regard to the measurement of PLU’s, BellSouth did not contest the fact that MCImetro Agreement at Article IV, Section 7.1 provides that the calculation of terminating usage based on standard AMA recordings was to be done by MCImetro for the purpose of generating connectivity bills, (Direct Testimony of Patrick Finlen, pg 8, lines 21-25) nor did BellSouth contend that MCImetro was not utilizing AMA data to calculate terminating usage. (Direct Testimony of Richard McIntire, pg. 4, lines 1-5).

15. The MCImetro Agreement requires that the terminating party’s terminating usage measurements, based on AMA data, is to be utilized to render connectivity bills. The MCImetro Agreement does not require the terminating party (MCImetro) to utilize usage measurements made by the originating party’s (BellSouth) to render connectivity bills.

16. In its July 16, 2001 letter, BellSouth states pay that MCImetro had invoiced BellSouth approximately 166 million minutes of use than BellSouth’s switches show

that BellSouth originated. BellSouth further stated that *“as the originating carrier, BellSouth believes that its records as to the amount of originated traffic are accurate”* and that BellSouth was using its records as the basis for payment of past due amounts. (Aronson Direct Testimony, 8/17/01 Affidavit, Exhibit 2, July 16, 2001 letter from Jerry Hendrix of BellSouth to Marcel Henry of WorldCom). This action by BellSouth is inconsistent with Attachment IV, Section 7.1 of the MCImetro Agreement.

17. BellSouth claims that, *“based on data that we have gathered”*, MCImetro is billing BellSouth for transit traffic, which is traffic originated by another carrier and should be billed to that other carrier (Direct Testimony of Richard McIntire, pg. 6, lines 18 – 23 and pg. 7, lines 1-2) or that *“MCImetro could be billing BellSouth for transit traffic, which should properly be billed to the originating third carrier”*. (Direct Testimony of Patrick Finlen, pg. 11, lines 8-9).
18. MCImetro’s billing system excludes from usage billed to BellSouth the traffic that was originated by other carriers. MCImetro billing system can identify the Local Exchange Carrier from which each call originated by comparing the originating NPA/NXX to industry published reference tables. In cases where calls are originated from ported numbers, the originating local routing number (LRN) is used to determine the Local Exchange Carrier that originated the call. For connectivity bills sent to BellSouth, the MCImetro billing system excludes usage originated from telephone numbers that are not BellSouth’s. This is not a unique protocol. It is the protocol prescribed by industry standards and utilized by the industry. (Aronson Rebuttal Testimony, pg. 6, lines 1-14).
19. As to the data that BellSouth claims to have gathered to support its allegation that MCImetro *“is”* or *“could be”* billing BellSouth incorrectly for transit traffic, BellSouth has been given the MCImetro billing data and could have identified any NPA/NXX’s that were not associated with a BellSouth Operating Company Number (OCN). BellSouth did not identify any mis-billed transit traffic in this data either to MCImetro (Aronson Rebuttal Testimony, pg 5, lines 20 –37) or to the TRA. MCImetro did not bill BellSouth for transit traffic that should properly be billed to the originating third carrier.

II. MCImetro's Request that BellSouth be found to be in Knowing and Intentional Violation of the TRA's July 12, 2001 Order

Issue: Whether BellSouth was in knowing and intentional violation of the TRA's July 12, 2001 Order for the period from August 15, 2001 through September 7, 2001.

24. The TRA's July 12, 2001 Order directed BellSouth to make all payments due to MCImetro by July 13, 2001, "*as ordered in the Hearing Officer's Initial Order*" issued on June 15, 2001. The Initial Order of the Hearing Officer directed BellSouth to pay past reciprocal compensation amounts due MCImetro and to pay reciprocal compensation prospectively under the MCImetro Agreement for ISP-bound traffic at the direct end office interconnection rate of \$.004 per minute of use. The Order was effective June 15, 2001.
25. On July 10, 2001, MCImetro sent BellSouth an invoice for reciprocal compensation due for the period of June 2001 usage. On August 15, 2001, BellSouth notified MCImetro that it was withholding payment of \$423,549.98 on the July 10, 2001 invoice. The stated basis for this withholding was that payment was being withheld for ISP usage. (Direct Testimony of Dan Aronson, 9/6/01 Affidavit, paragraphs 6 -7 and Attachment 2)
26. On September 7, 2001, BellSouth admitted that it had withheld reciprocal compensation for ISP-bound traffic in clear violation of the TRA's July 12, 2001 Order. BellSouth indicated that it would make payment by electronic transfer "*today*" to MCImetro for ISP-bound traffic in compliance with the TRA's July 12, 2001 Order. (9/7/01 Affidavit of Richard McIntire, paragraphs 3-4.)
27. Mr. McIntire's September 7, 2001 Affidavit indicates that this action by BellSouth to withhold payment for ISP usage on the July 10, 2001 MCImetro invoice was "*in error*". However, this action to withhold payment by BellSouth and indicate in its dispute letter that the withholding is for ISP usage is a continuation of a well-established BellSouth practice. (MCImetro Hearing Exhibit, BellSouth Dispute Letters, February 1998 through July 2001).

28. BellSouth's statement that this action on August 15, 2001 to withhold payment on the MCImetro July 10, 2001 invoice for ISP usage was an "error" is no defense to and does not excuse BellSouth from the consequences of its direct violation of the TRA's July 12, 2001 Order, especially since BellSouth had been explicitly put on notice by the TRA that it expected its Order to be obeyed and admonished BellSouth for its past pattern of disregard of its Orders. BellSouth knowingly and intentionally violated the July 12, 2001 Order of the TRA for the period from August 15, 2001 through September 7, 2001.

Issue: Whether BellSouth was in knowing and intentional violation of the TRA's July 12, 2001 Order on July 13, 2001 and remains in knowing and intentional violation of the TRA's July 12, 2001 Order to date.

29. The TRA's July 12, 2001 Order directed BellSouth to make all payments due to MCImetro by July 13, 2001, "*as ordered in the Hearing Officer's Initial Order*" issued on June 15, 2001. The Initial Order of the Hearing Officer directed BellSouth to pay past reciprocal compensation amounts due MCImetro and to pay reciprocal compensation prospectively under the MCImetro Agreement for ISP-bound traffic at the direct end office interconnection rate of \$.004 per minute of use. The Order was effective June 15, 2001.

30. On July 10, 2001, MCImetro provided to BellSouth a pro forma schedule from MCImetro's records that disclosed the total amount due of \$10.2 million. This pro forma schedule re-rated the local usage throughout the history of the account at the direct end office termination rate of \$.004 per minute of use as contained in the MCImetro Agreement in conformance with the Hearing Officer's Initial Order. (Direct Testimony of Dan Aronson, 8/17/01 Affidavit, paragraphs 4-5 and Exhibit 1).

31. On July 16, 2001, BellSouth indicated that it had made an initial payment to MCImetro of \$2,223,231 on July 15, 2001 and a subsequent payment of \$700,000 on July 16, 2001. (Direct Testimony of Dan Aronson, 8/17/01 Affidavit, paragraph 5 and Exhibit 2, July 16, 2001 letter from Jerry Hendrix, BellSouth to Marcel Henry, MCIWorldCom.)



32. One of the stated basis for the discrepancy in the BellSouth July 15, 2001 payment and the amount indicated on the pro forma schedule provided to BellSouth by MCImetro was that BellSouth applied the end office switching rate of \$.0008041. BellSouth's July 16, 2001 letter stated,

*"Per its terms, the April 4, 1997 [MCImetro] Interconnection Agreement expired on April 3, 2000. That Interconnection Agreement had a provision that provides that the rates terms and conditions agreed to in a subsequent agreement (i.e. the pending arbitration) will be retroactive back to the expiration date. Accordingly, BellSouth paid [on July 15, 2001] for local ISP usage at a rate of \$.004 through April 3, 2000, and per the TRA's order in the 97-01262 docket (June 15, 2001), has applied the end office switching rate of \$.0008041 from April 4, 2000 to present."*

(Direct Testimony of Dan Aronson, 8/17/01 Affidavit, Exhibit 2, July 16, 2001 letter from Jerry Hendrix, BellSouth to Marcel Henry, MCIWorldCom).

33. On July 15, 2001, when BellSouth calculated and unilaterally took a retroactive credit to reflect a lower reciprocal compensation rate, BellSouth did not unilaterally issue a retroactive credit to MCImetro for lower reciprocal compensation and UNE rates. (Rebuttal Testimony of Dan Aronson, pg 10, lines 36-37).

34. As of July 16, 2001, BellSouth acknowledges (1) that the appropriate reciprocal compensation rate to be paid under the MCImetro Agreement is the \$.004 direct end office interconnection rate; (2) that the provision in the MCImetro Agreement (Part A, Section 3) that requires a retroactive application of new rates back to the April 4, 2000 is not triggered until a new agreement resulting from "the pending arbitration" in Tennessee is executed and (3) that a new agreement between MCImetro and BellSouth in Tennessee has not been executed. BellSouth made a knowing and intentional decision to pay at a rate of \$.0008041 rather than the \$.004 rate in violation of the TRA's July 12, 2001 Order.

35. n July 20, 2001, MCImetro provided its response to BellSouth,

*"Per the [MCImetro] Agreement, retroactive rates are only to be applied after a new agreement has been executed and approved. As this has not occurred in Tennessee between the MCImetro and BellSouth, no true-up is required. The Agreement does not allow*

*parties to unilaterally apply a true-up in anticipation of a new contract. Thus the rate of \$.004 is the appropriate rate.*

*In summary ... we believe that BellSouth is blatantly disregarding the clear order of the TRA, the Agreement and traditional business and industry practices. We intend to alert the TRA of your actions and utilize any available legal means to enforce the TRA's Order and the Agreement."*

(Rebuttal Testimony of Dan Aronson, Attachment 6, July 20, 2001 Letter from Dan Aronson, MCIWorldCom to Jerry Hendrix, BellSouth).

36. As of July 20, 2001, BellSouth was aware that MCImetro would insist that the provisions of Part A, Section 3 of the MCImetro Agreement dealing with retroactive credits for new UNE and reciprocal compensation rates and that the TRA's July 12, 2001 Order, be complied with. Rather than comply with the TRA's July 12, 2001 Order and pay reciprocal compensation at the \$.004 rate ordered by the Hearing Officer, BellSouth embarked on a new strategy to suggest that the MCImetro Agreement be amended to conform the contract to be consistent with their previous knowing and intentional actions in violation of the TRA Order.
37. On August 8, 2001, almost a month after BellSouth had been directed by the TRA to pay MCImetro at a rate of \$.004 and their unilateral decision to pay at a rate of \$.0008041, BellSouth sent a proposed amendment to MCImetro to change the reciprocal compensation rates in the MCImetro Agreement. MCImetro did not execute that amendment. (Rebuttal Testimony of Dan Aronson, pg. 10, lines 11-15)
38. By its action on August 8, 2001 seeking to amend the MCImetro Agreement, BellSouth acknowledged that, in the absence of an amendment to the MCImetro Agreement, the direct end office reciprocal compensation rate to be paid was the \$.004 per minute of use as found by the TRA. Yet, BellSouth refused to reverse its previous action of July 13, 2001 to pay at a rate of \$.0008041, rather than \$.004 that had been ordered by the TRA. This action was a knowing and intentional.
39. After MCImetro filed its Motion for Sanctions, BellSouth decided to take a new tack. On September 18, 2001, BellSouth put forward the position that an amendment to the Interconnection Agreement is necessary to update the reciprocal compensation rates

because the rate in the contract changed automatically when the TRA made its decision in Docket No. 97-01262. (Direct testimony of Patrick Finlen, pg. 7, lines 18-25 and pg. 8, lines 1-3). This argument is unavailing. As an initial matter, the TRA Order, by its terms, directed BellSouth to file a tariff to *“provide the parties the opportunity to adopt UNE rates established in a contested case proceedings that are consistent with the Act.”* Furthermore, the BellSouth Tariff, by its terms, provides that the *“provisions of this Tariff do not supercede or in any way modify the provisions, including rates, terms and conditions, of any currently effective agreement between any CLEC and the Company.”*

40. To date, BellSouth continues to make a knowing and intentional decision pay MCImetro at a rate of \$.0008041 in violation of the TRA’s July 12, 2001 Order to pay MCImetro reciprocal compensation at a rate of \$.004.

### III. MCImetro’s Request that BellSouth be found To have Engaged in Anti-Competitive Conduct

41. BellSouth’s knowing and intentional violations of the TRA’s July 12, 2001 Order for the period August 15, 2001 to September 7, 2001 and its continuing knowing and intentional violation of the TRA’s July 12, 2001 Order in failing to pay MCImetro at the end office reciprocal compensation rate of \$.004 constitutes bad faith dealings with MCImetro and anti-competitive conduct.

Issue: Whether BellSouth’s dealings with MCImetro on the issue of its claimed usage discrepancies on its dispute letters for the period from the January 2000 MCImetro invoice to date constitutes bad faith dealings and anti-competitive conduct.

BellSouth claims that MCImetro has billed BellSouth approximately 166 million minutes of use more than BellSouth’s recordings show it originated (Direct Testimony of Patrick Finlen, pg. 10, lines 24-25 and pg. 11, line1). BellSouth states that it has followed proper dispute resolution procedures because BellSouth sends a letter to MCImetro explaining any amounts withheld to institute a billing dispute. (Direct testimony of Patrick Finlen, pg. 11, lines 18-21).

BellSouth presents its calculation of the total amount due to MCImetro as \$2,935,939. (Rebuttal Testimony of Richard McIntire, pg. 2, lines 5-12 and Exhibit RM-1).

42. The column labeled BellSouth MOUs in Exhibit RM-1 shows that BellSouth has calculated a different amount of usage than that billed by MCImetro for each month beginning with the February 10, 1998 invoice through the June 10, 2001 invoice. BellSouth's calculation of usage is 166,564,233 minutes of use less than the usage calculated by MCImetro as shown on Exhibit RM-1 (Aronson Direct Testimony, 8/17/01 Affidavit, Exhibit 1).
43. On January 31, 2000, BellSouth first notified MCImetro by letter that BellSouth was paying usage on the MCImetro January 10, 2000 invoice "based on BellSouth's recordings". Prior to January 31, 2000 dispute letter, BellSouth did not indicate to MCImetro that it had a dispute with billed usage or MCImetro's usage measurements. (Direct Testimony of Dan Aronson, 8/17/01 Affidavit, paragraph 11). The usage disputes indicated on the BellSouth Exhibit RM-1 for the period from the February 10, 1998 invoice through the December 10, 1999 invoice; the February 10, 2000 invoice; the May 10 2001 invoice and the July 10, 2001 invoice were not presented to MCImetro by the BellSouth dispute letters. (MCImetro Hearing Exhibit, BellSouth Dispute Letters, February, 1998 through July 2001, pgs. 1-19)
44. In the BellSouth dispute letters for the period beginning with MCImetro's January 10, 2000 invoice, the explanation given by BellSouth was that "We are paying based on BellSouth recordings" and "invoiced mou's exceed BST recordings. These dispute letters do not present the amounts of usage in dispute or the amount of the billed amount being withheld as a result the usage being disputed. (MCImetro Hearing Exhibit, BellSouth Dispute Letters, February, 1998 through July 2001, pgs.20-53). This is the full extent of the explanation and information that MCImetro received from BellSouth from the beginning of these usage disputes through to present. (Rebuttal Testimony of Dan Aronson, pg. 8, lines 23-25.)
45. On April 14, 2000, MCImetro requested that BellSouth provide the BellSouth usage measurements that provided the basis for BellSouth's usage disputes. MCImetro

requested the usage data from BellSouth's switch recordings so that MCImetro could compare BellSouth's usage measurements with MCImetro's usage measurements in order to identify and investigate the claimed usage variances and resolve any usage disputes. (Rebuttal Testimony of Dan Aronson, pg. 4, lines 5-7 and Rebuttal Testimony Exhibit 1, April 14, 2000 letter from Dan Aronson, MCIWorldCom to Richard McIntire, BellSouth). BellSouth has not provided MCImetro with the data necessary to perform a reconciliation of usage variations in order to resolve the claimed usage dispute. (Direct Testimony of Dan Aronson, 8/17/01 Affidavit, paragraphs 12-13.)

46. Throughout the calendar year 2000, MCImetro continued to request that BellSouth provide the usage measurement detail from BellSouth's switches that was indicated in their dispute letters. No data was provided. (Rebuttal Testimony of Dan Aronson, pg. 4, lines 8-11). During this period, BellSouth's "upper management" had instructed its employees not to provide MCImetro with data that would disclose the amount of usage in dispute. (Rebuttal Testimony of Dan Aronson, pg.4, lines 16-21). BellSouth has not and will not provide MCImetro with its claimed measurement of minutes of use invoiced which "exceed the minutes of use recorded by the BellSouth switch" as indicated in the BellSouth dispute letters for the period beginning with the MCImetro January 10, 2000 invoice. (Rebuttal Testimony of Dan Aronson, pg. 8, lines 26-28).
47. The MCImetro Agreement calls for certain procedures to be followed for resolution of a billing dispute. (Rebuttal Testimony of Patrick Finlen, pg. 7) Attachment VIII, Section 3.1.18 of the interconnection agreement provides a "Bill Reconciliation" process and provides that each party is to notify the other party when a billing discrepancy arises and "*endeavor to resolve the discrepancy within sixty (60) calendar days notification using normal business procedures*". With respect to MCImetro invoices for the period prior to January 10, 2000, BellSouth did not indicate to MCImetro that it had a dispute with the invoiced usage. With respect to the period since the MCImetro January 10, 2000 invoice, BellSouth's action in refusing to provide MCImetro with the data necessary to support their usage dispute does not constitute an "*endeavor to resolve the discrepancy within 60 days using normal business procedures.*"

Issue: Whether BellSouth's action to withhold payment on July 15, 2001 on the basis of a claimed discrepancy in usage for the invoice periods of period February 10, 1998 through December 10, 1999; the February 10, 2000 invoice; the May 10 2001 invoice and the July 10, 2001 invoice constitutes bad faith dealings and anti-competitive conduct.

48. In its July 16, 2001 letter, BellSouth states pay that MCImetro had invoiced BellSouth approximately 166 million minutes of use than BellSouth's switches show that BellSouth originated. BellSouth further stated that "*as the originating carrier, BellSouth believes that its records as to the amount of originated traffic are accurate*" and that BellSouth was using its records as the basis for payment of past due amounts. (Aronson Direct Testimony, 8/17/01 Affidavit, Exhibit 2, July 16, 2001 letter from Jerry Hendrix of BellSouth to Marcel Henry of WorldCom). BellSouth presents its calculation of the total amount due to MCImetro as \$2,935,939 based on its usage of 1,292,335,211 minutes of use. (Rebuttal Testimony of Richard McIntire, pg. 2, lines 5-12 and Exhibit RM-1). The column labeled BellSouth MOUs in Exhibit RM-1 shows that BellSouth has calculated a different amount of usage than that billed by MCImetro for the period from the February 10, 1998 invoice through the December 10, 1999 invoice; the February 10, 2000 invoice; the May 10 2001 invoice and the July 10, 2001 invoice. (Rebuttal testimony of Richard McIntire, Exhibit RM-1)
49. The usage disputes indicated on the BellSouth Exhibit RM-1 for the period from the February 10, 1998 invoice through the December 10, 1999 invoice; the February 10, 2000 invoice; the May 10 2001 invoice and the July 10, 2001 invoice were not presented to MCImetro by the BellSouth dispute letters. (MCImetro Hearing Exhibit, BellSouth Dispute Letters, February 1998 through July 2001, pgs. 1-19).

Issue: Whether BellSouth's action to withhold payment on July 15, 2001 on the basis of a claimed discrepancy in usage and PLU's after failing to raise these issues in the case constitutes bad faith dealings and anti-competitive conduct.

50. This case began as a Petition filed by MCImetro on September 8, 1999 to enforce the MCImetro Agreement. A procedural schedule was established by agreement of the parties for pre-filing of MCImetro's direct testimony on May 11, 2000; rebuttal testimony by BellSouth on May 18, 2000 and further rebuttal testimony by MCImetro

on May 24, 2000. Discovery was conducted by BellSouth. After several revisions to the hearing schedule, the parties agreed that cross-examination of witnesses would be conducted by depositions and that the depositions would be entered into the record in lieu of cross-examination by the parties. A hearing was held on December 7, 2000, during which all pre-filed testimony and responses to discovery requests were entered into the record. No party placed a deposition transcript into the record. (Initial Order, pgs.1-3).

51. The direct testimony of Dan Aronson was filed on May 11, 2000. In that testimony, Mr. Aronson presented a schedule as Exhibit 1, which showed that the dollar amount that MCImetro claimed was due and owing as of that date was \$3,575,462. In support of that figure, MCImetro presented both the toll and local minutes of use and the rate that had been billed in support of that claim. At the time of the filing on May 11, 2000, BellSouth was well aware of MCImetro's position on BellSouth's local and toll disputes based on their claimed originating usage and PLU measurements. (Rebuttal Testimony of Dan Aronson, pg.2, lines 15-28 and Attachment). From this data, BellSouth could have determined the total usage amount and the derived Percentage Local Use (PLU) and should have put forward, at that time, any disputes that they had with the MCImetro usage and PLU calculations which formed the basis for the MCImetro claim that \$3,575,462 was due and owing as of that date.

BellSouth did not present testimony or raise any issue in those proceedings concerning the local and toll usage amounts presented in support of MCImetro's claim that the amount due and owing was \$3,575,462. (Rebuttal Testimony of Dan Aronson, p. 3, lines 18-22).

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

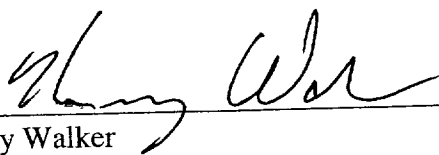
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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via fax or hand delivery and U.S. mail to the following on this the 7<sup>th</sup> day of November, 2001.

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Henry Walker